

No. 15157

United States
Court of Appeals
for the Ninth Circuit

EARL BENNETT,

Appellant,

vs.

E. W. BAILLY, Trustee in Bankruptcy, of Proc-
tor's Monte Cristo, Inc., a Corporation, Bank-
rupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Witnesses:

Adams, Oscar M.

—by Mr. McDonnell 37

Bennett, Earl

—by Mr. McDonnell 54

—by Mr. Middleton 59

Proctor, Thomas

—by Mr. McDonnell 34, 46, 59

—by Mr. Middleton 53

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MILLER, VANDEGRIFT & MIDDLETON,
DARWIN H. WOLFORD,
ERNEST R. UTLEY,
417 South Hill Street,
Los Angeles 13, California.

For Appellee:

C. E. H. McDONNELL, ESQ.,
CRAIG, WELLER & LAUGHARN,
111 West Seventh Street,
Los Angeles 14, California.

United States District Court for the Southern
District of California

ORDERS OF ADJUDICATION AND
OF GENERAL REFERENCE

At Los Angeles, in said District, on March 4, 1955.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number: 65347 WB.

Title of Proceedings: Proctor's Monte Cristo, a Corporation.

Filed: 3-4-55.

Referee: Nelson C. Peters, Esq., Los Angeles, Calif.

LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed March 4, 1955.

In the District Court of the United States for the
Southern District of California, Central Division

In Bankruptcy No. 65,347-WB

In the Matter of
PROCTOR'S MONTE CRISTO, INC., a Corporation,
Bankrupt.

PETITION FOR ORDER TO SHOW CAUSE
To the Honorable N. C. Peters, Referee in Bankruptcy:

Comes now E. W. Bailly, and respectfully represents:

I.

That he is the duly appointed, qualified and acting trustee in the above-captioned bankruptcy matter.

II.

An examination by your trustee herein has developed the following facts concerning a certain on-sale liquor license, No. P-11129: this liquor license originally stood in the name of Niel McDermott; that sometime in the month of October, 1954, the said McDermott entered into an escrow with the bankrupt corporation for the transfer of the said liquor license for and in consideration of the payment of the sum of \$18,000; that the said \$18,000 was paid by Earl Bennett by a personal check deposited in the escrow and the said license was forthwith transferred to the bankrupt corpora-

tion; that the said license has at all times, and does now, stand in the name of the bankrupt corporation; that on or about January 13, 1955, Earl Bennett made application to the California [3*] State Board of Equalization and gave notice of intention to transfer the said liquor license to the said Earl Bennett without consideration; that your petitioner is further informed and believes and therefore alleges that the said transfer has not as yet been accomplished but is being held in abeyance pending this bankruptcy proceeding; that the transfer of the liquor license to the said Bennett without consideration would constitute a fraud upon the creditors of this bankrupt estate inasmuch as the same is being accepted without consideration.

Wherefore, your petitioner prays that an order to show cause issue on Earl Bennett and the Board of Equalization of the State of California to be and appear before the Referee in Bankruptcy on a day fixed, and then and there show cause, if any they may have, why an order should not be made fixing and determining that that certain on-sale liquor license, No. P-11129, presently standing in the name of the bankrupt corporation, is the property of the said corporation free and clear of any right, title or claim thereto on the part of Earl Bennett; and

Your petitioner further prays that a temporary restraining order issue on Earl Bennett and on the Board of Equalization of the State of California forbidding and restraining the transfer of the on-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

sale liquor license until a final order is entered in the within proceedings.

Dated: March 25, 1955.

/s/ E. W. BAILLY,

Trustee in Bankruptcy.

CRAIG, WELLER &

LAUGHARN,

By /s/ C. E. H. McDONNELL,

Attorneys for Trustee.

Duly verified. [4]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER BASED THEREON

This matter having come on for hearing on the verified Petition for Order to Show Cause of E. W. Bailly on April 5, 1955, at the hour of 9:30 a.m. thereof; and Trustee having appeared in person and represented by his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell, and respondent Earl Bennett having appeared in person and represented by his counsel, Miller Vandegrift and Middleton, and Darwin H. Wolford by Thomas J. Middleton, and the Department of Alcoholic Beverage Control of the State of California having also appeared as respondent; and evidence both oral and documentary having been offered and received, and the matter having been taken under submission pending the filing of briefs, and it appearing that briefs have been filed herein, the Court does not

make the following Findings of Fact, Conclusions of Law and Order Based Thereon: [6]

Findings of Fact

I.

The Court finds as true that the within bankruptcy proceedings were commenced by the filing on March 4, 1955, of a Voluntary Petition in Bankruptcy by Proctor's Monte Cristo, Inc., a California corporation, and that immediately upon such filing the said corporation was adjudicated a bankrupt. The Court further finds as true that on March 5, 1955, an Order was made referring the above-captioned bankruptcy proceedings to the Honorable N. C. Peters, Referee in Bankruptcy. The Court further finds as true that on March 22, 1955, the First Meeting of Creditors was held before Referee Peters in San Bernardino, at which time E. W. Bailly was nominated, elected and confirmed as Trustee in bankruptcy for Proctor's Monte Cristo, Inc., the bankrupt herein, and that the said E. W. Bailly immediately thereupon filed his bond in the sum ordered by the Court, and qualified and from and after March 22, 1955, the said E. W. Bailly did at all times act as Trustee in the above-captioned bankruptcy proceedings.

II.

The Court finds as true that prior to the commencement of bankruptcy proceedings herein the bankrupt had operated a bar and restaurant in San Bernardino, California, popularly known and described as "Proctor's Monte Cristo."

III.

The Court finds as true that on or about September 3, 1954, the bankrupt corporation entered into an escrow agreement with Neil McDermott, for the purchase of an "On Sale" Liquor License No. P-11129, for and in consideration of the payment of the sum of \$18,000.00. The Court further finds as true that thereafter the said escrow closed, and the said described liquor license was transferred to and placed in the name of the bankrupt corporation herein. [7]

IV.

The Court finds as true that the consideration of \$18,000.00 paid to Neil McDermott for the Liquor License No. P-11129 was paid as follows: Respondent Bennett paid \$500.00 outside of escrow to McDermott, and respondent Bennett deposited his personal check for \$17,500.00 in the escrow as the balance of the purchase price. The Court further finds as true that none of the purchase price of \$18,000.00 paid as aforesaid to McDermott came from the bankrupt corporation.

V.

The Court finds as true that on September 3, 1954, the bankrupt corporation and the respondent Earl Bennett, together with his wife, Isabelle L. Bennett, entered into an "Agreement Re Liquor License," which Agreement contained a personal guarantee by Thomas L. Proctor and Shirley Mae Proctor, which Agreement is attached hereto, marked Exhibit "A," and by this reference incor-

porated herein as though set forth in full at this point.

VI.

The Court finds as true that the corporation did not fulfill the terms of the said contract, either as to monthly payments or by reimbursing Bennett.

VII.

That by January, 1955, the bankrupt corporation was insolvent. The Court further finds as true that while insolvent in the month of January, 1955, the bankrupt corporation entered into an escrow agreement with Respondent Bennett to transfer On Sale Liquor License No. P-11129 to Respondent Bennett and his wife, Isabelle L. Bennett, without any consideration whatsoever.

VIII.

On Sale Liquor License No. P-11129 never stood at any time in the name of Earl Bennett and/or Isabelle L. Bennett, or either of them. [8]

Conclusions of Law

I.

The Court concludes that the On Sale Liquor License No. P-11129 is the property of this bankrupt estate.

II.

The Court concludes that the "Agreement Re Liquor License" is illegal as an attempt to circumvent and violate the provisions of the Alcoholic Beverage Control Act of the State of California,

and as an illegal contract is not binding upon this bankrupt estate.

Now, Therefore,

It Is Ordered that the Petition of the Trustee herein be, and the same hereby is granted, and it be and it hereby is fixed and determined that On Sale Liquor License P-11129 is the property of this bankrupt estate, and that Respondent Earl Bennett and the Alcoholic Beverage Control Board of the State of California have no right in and to the said license superior to that of the bankrupt estate herein.

/s/ N. C. PETERS,

Referee in Bankruptcy. [9]

7/21/1955.

EXHIBIT A

Agreement Re Liquor License

Whereas, Earl Bennett and Isabelle L. Bennett are personally paying the acquisition cost of a general on sale liquor license and are paying the sum of \$18,000.00 for said general on sale liquor license; and

Whereas, the said Bennetts propose to acquire same in the name of Proctor's Monte Cristo; and

Whereas, the said Bennetts are allowing the license to be taken in the name of the corporation;

Now, Therefore, it is hereby mutually agreed by and between Proctor's Monte Cristo, a corporation, and the said Bennetts that so long as the said corporation retains said liquor license, the said cor-

poration shall pay to the said Bennetts the sum of \$350.00 per month, the first of said monthly payments to be due and payable October 15, 1954.

The said Bennetts further grant to the said corporation an option to purchase said liquor license at any time on or before October 15, 1956, by paying to the said Bennetts the sum of \$18,000.00.

It is the further understanding of the parties hereto that should the corporation desire to exercise said option, the said corporation will be given no credit for whatever payments have been made as herein provided for prior to the time that said option is exercised.

It is the further agreement of the parties hereto that in the event the general on sale liquor license is suspended on two occasions by the State Board of Equalization, the Bennetts shall have the option of demanding the return of the liquor license and the corporation agrees to return said liquor license to said Bennetts within sixty (60) days after said demand is made, provided further that the said corporation, in the event such demand [10] is made by the Bennetts, shall have the option of either returning the said liquor license to the said Bennetts or paying the sum of \$18,000.00.

Proctor's Monte Cristo, a corporation, further promises and agrees that in the event it has not exercised the option to purchase liquor license, that it will on or before the 15th day of October, 1956, cause the said liquor license to be transferred to the said Bennetts or their assigns.

In Witness Whereof, the parties hereto have ex-

ecuted this Agreement re Liquor License this 3rd day of September, 1954.

/s/ EARL BENNETT,

/s/ ISABELLE L. BENNETT,

PROCTOR'S MONTE CRISTO,
a Corporation,

By /s/ THOMAS L. PROCTOR,
President;

By /s/ EARL BENNETT,
Secretary.

GUARANTEE

Come now Thomas L. Proctor and Shirley Mae Proctor and in consideration of Earl Bennett and Isabelle L. Bennett acquiring the general on-sale liquor license hereinabove referred to and causing same to be transferred to the name of Proctor's Monte Cristo, a corporation, the undersigned, Thomas L. Proctor and Shirley Mae Proctor, do hereby, both jointly and severally, guarantee to Earl Bennett and Isabelle L. Bennett that each and every agreement of Proctor's Monte Cristo, a corporation, hereinabove provided for, shall be fully and faithfully performed and that in the event the said Proctor's Monte Cristo, a corporation, does not make any of [11] the payments to the said Bennetts as hereinabove provided for or does not retransfer the said liquor license as hereinabove provided for, the undersigned personally promise to the said Bennetts that they will make such payments, or in the event the said Bennetts exercise the option requiring the return of the said liquor

license, the said Proctors will either cause said liquor license to be returned to the said Bennetts, or will personally pay to the said Bennetts the sum of \$18,000.00.

Dated this 3rd day of September, 1954.

/s/ THOMAS L. PROCTOR,

/s/ SHIRLEY MAE PROCTOR.

July 14, 1955.

Miller, Vandegrift, Middleton &
Darwin H. Wolford,
116 Surety Bldg.,
7335 Van Nuys Blvd.,
Van Nuys, California.

Attention: Darwin H. Wolford.

Re: Proctor's Monte Cristo, Inc.
No. 65347-WB

Dear Sir:

In reply to your letter of July 9, 1955, objecting to certain findings I will say that the reason I cannot allow said changes is, that while the equities are in favor of said respondents, Bennetts, the equities in favor of the creditors of the corporation and the rights held by the trustee are superior to the interests of the Bennetts.

The liquor license was placed in the name of the corporation under which the corporation incurred the debts set out in the schedules and creditors had a right to rely upon the fact that the license was in the name of the corporation and in relying thereon bankrupt incurred indebtedness without any notice

or knowledge by creditors of any equity of said respondents because of having advanced the money for the license to place it in the name of the corporation and the standing of the trustee in bankruptcy is superior to the claim of any secret lien holder or claimant.

Yours truly,

/s/ N. C. PETERS.

Copies mailed to:

Craig, Weller & Laugharn.

This letter should be attached as a finding.

/s/ N. C. PETERS,

Referee. [13]

Darwin H. Wolford
Attorney at Law
116 Surety Bldg.
7335 Van Nuys Blvd.
Van Nuys, California
State 5-1166

July 9, 1955.

N. C. Peters,
Referee in Bankruptcy,
211 Katz Bldg.,
San Bernardino, California.

Dear Mr. Peters:

In Re: Proctor's Monte Cristo, Inc.,
No. 65347-WB

I am in receipt of the proposed Findings of Fact and Conclusions of Law submitted by the Attorneys for the Trustee. An examination thereof indicates

their correctness in accordance with your Memorandum Decision, with the following exceptions, which I feel should be included.

Paragraph VII of said Proposed Findings of Fact should be changed and as changed should read as follows:

VII.

That by January, 1955, the Bankrupt Corporation was insolvent. The Court finds as true that while insolvent, in the month of January, 1955, the Bankrupt Corporation entered into an agreement with Respondent Bennett, to transfer on-sale Liquor License No. P-11129 to Respondent Bennett, and his wife, Isabelle L. Bennett; that the consideration for said transfer was that said Respondent Bennett had paid \$18,000.00 for said Liquor License, and the Corporation had paid no consideration for its use; that said Corporation was merely placing in Bennett's name, the License which should have been placed in his name in the first instance; that said Corporation was never entitled to receive said License, or to have same in its name.

We further object to the "Conclusions of Law" in the following particulars, and submit the following proposed changes:

We submit that Paragraph I of said Conclusions of Law should read as follows: [14]

I.

The Court concludes that the "On-Sale" Liquor License No. P-11129 was never legally, property of this Bankrupt Corporation.

We submit that paragraph II of said Conclusions should read as follows:

II.

The Court concludes that the issuance of the Liquor License to the Corporation is and was void ab initio, and that the license should have been issued to the Respondent, Bennett, in the first instance. The Court further concludes that an agreement attempting to hypothecate or pledge Liquor License as security, is illegal and void. The Court further concludes that it is not illegal to transfer a Liquor License to a party who has paid the full consideration for said License.

I have taken this means of suggesting these changes rather than to submit a complete set of Findings and Conclusions, because that would be merely a duplication. Of course it follows, that if the suggested changes are adopted, particularly in the Conclusions, that the Order submitted by the Trustee would be improper, but we do submit that the changes above suggested meet the factual and legal conditions.

Very truly yours,

MILLER, VANDEGRIFF &
MIDDLETON and

DARWIN H. WOLFORD,

By /s/ DARWIN H. WOLFORD.

DHW :lw

A carbon copy of the foregoing was this day, 7/9/55, mailed to:

Craig, Weller & Laugharn, Attorneys at Law,
111 West Seventh Street, Suite 817,
Los Angeles 14, California.

[Endorsed]: Filed August 19, 1955. [15]

[Title of District Court and Cause.]

DECISION ON CLAIM TO LIQUOR LICENSE

This matter came on for hearing April 5, 1955, upon a petition for Order to Show Cause issued against Earl Bennett, Department of Alcoholic Beverage Control of the State of California.

Thomas J. Middleton appeared as attorney for Alcoholic Beverage Control and Darwin H. Wolford attorney for Earl Bennett and C. E. H. McDonnell attorney for trustee, and

The matters were submitted to the Referee for decision upon stipulated facts and written briefs and arguments on the question of law and the Court after receiving written briefs and arguments of both parties and having considered the same, finds the facts and law in favor of the trustee and that the fact that Mr. Bennett paid Eighteen Thousand and no/100 (\$18,000) dollars for the license indicate that they are some real value in it and that creditors relied upon the license belonging to the corporation in extending credit to it which would not have been done otherwise.

The fact that it cannot be reached directly by creditors under levy or writ of attachment does not destroy its value as an equitable [26] asset. Money due an employee from the United States Government cannot be reached directly by writ of attachment or execution without the consent of said government, but it may be reached by proceeding in aid of execution. All the interest and equities of the estate pass to the trustee and the claim of Mr. Bennett will have to be denied.

Attorney for trustee may prepare findings.

Dated 6/23/1955.

/s/ N. C. PETERS,
Referee.

[Endorsed]: Filed August 19, 1955. [27]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE ON EARL
BENNETT AND STATE BOARD OF
EQUALIZATION FOR THE STATE OF
CALIFORNIA

Upon reading and filing of the verified petition for an order to show cause of E. W. Bailly, trustee in the above-captioned bankruptcy matter, and good cause appearing therefor,

Now, Therefore, upon motion of Craig, Weller & Laugharn by C. E. H. McDonnell, attorneys for the trustee,

It is Ordered that Earl Bennett and the Board of Equalization of the State of California be and appear before the undersigned Referee in Bankruptcy in his courtroom, 211 Katz Building, San Bernardino, California, on the 5th day of April, 1955, at the hour of 9:30 a.m. thereof, and then and there show cause, if any they may have, why an order should not be made fixing and determining that that certain on-sale liquor license, No. P-11129, presently standing in the name of the bankrupt corporation, is the property of the said corporation free and clear of any right, title or claim thereto on the part of Earl Bennett; and

It Is Further Ordered that a temporary restraining order issue on Earl Bennett and on the Board of Equalization of the State of California forbidding and restraining the transfer of the on-sale [28] liquor license until a final order is entered in the within proceedings; and

It Is Further Ordered that service of the petition and order be made upon the respondents, and each of them, by placing a copy of the within petition and order in an envelope and depositing same in a United States Post Office, postage prepaid, as follows:

Earl Bennett,
155 South Greenleaf Street,
Whittier, California.

Mr. Russell Munroe,
Director of Alcoholic Beverage Control,
Sacramento, California.

Mr. Charles Shorey,
Calif. State Board of Equalization,
San Bernardino, California.

Dated: March 25, 1955.

/s/ N. C. PETERS,
Referee in Bankruptcy.

[Endorsed]: Filed August 19, 1955. [29]

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable N. C. Peters, Referee in Bankruptcy:

Petitioner Earl Bennett, an interested party herein, petitions for a review of the Order made and entered herein on July 21, 1955, entitled "Findings of Fact, Conclusions of Law and Order Based Thereon." Petitioner respectfully shows:

I.

Petitioner Earl Bennett is a stockholder of the above-named bankrupt corporation and is an interested party in and to the within proceeding under the facts herein stated. The subject of the instant proceeding presents for adjudication the problem of whether title to the "on-sale liquor license" herein involved was passed to and became an asset of the bankrupt corporation under the terms and provisions of the revocable and unexercised option

attached to the Referee's Findings as Exhibit "A" wherein petitioner and Isabelle L. Bennett, husband and wife, granted to the above-named bankrupt the right to purchase the aforesaid liquor license on or before October 15, 1956, upon payment to the Bennetts of the sum of \$18,000.00. [30]

II.

On March 24, 1955, the trustee herein filed his petition for an order to show cause on petitioner, Earl Bennett, and the California State Board of Equalization (amended at the hearing thereof to read "Department of Alcoholic Beverage Control of the State of California") requiring them to show cause before the Referee, if any they have, why said "on-sale liquor license" should not be determined to be an asset of the bankruptcy estate.

III.

Said petition in effect contained the following allegations:

(a) That said liquor license originally stood in the name of Niel McDermott.

(b) That thereafter petitioner Earl Bennett paid McDermott therefor the sum of \$18,000.00 by his personal check.

(c) That the paper title to said liquor license was thereupon placed in the bankrupt corporation and the same still stood in the name of the bankrupt at the institution of the within bankruptcy.

(d) That on January 13, 1955, petitioner made an application to the Department of Alcoholic Bev-

erage Control of the State of California for the transfer of said liquor license to the petitioner.

(e) That as a matter of law the aforesaid liquor license was the property of the bankrupt and the petitioner's application for its transfer to him was without consideration and a fraud upon the creditors of the bankrupt estate for the sole reason that the license "is being accepted without consideration."

IV.

Based on the aforesaid allegations in the petition, an order to show cause was issued by the Referee on March 25, 1955, ordering the petitioner and the California Department of Alcoholic [31] Beverage Control to appear before the Referee and show cause on the 5th day of April, 1955 "why an order should not be made fixing and determining that that certain on-sale liquor license, No. P-11129, presently standing in the name of the bankrupt corporation, is the property of the said corporation free and clear of any right, title or claim thereto on the part of Earl Bennett."

V.

The hearing on said petition and order to show cause took place on April 5, 1955, at which the following was established by undisputed testimony:

1. The liquor license was previously owned by one Neil McDermott, and petitioner, Earl Bennett, subsequently purchased it from McDermott and paid him therefor the sum of \$18,000.00 with his individual funds.

2. On September 3, 1954, a written option was executed by petitioner and his wife, as optionors, and the bankrupt corporation as optionee, under the terms of which the bankrupt was granted the right to purchase the liquor license at any time on or before October 15, 1956, by paying to the Bennetts the sum of \$18,000.00, same being the identical amount petitioner individually had paid to McDermott. Said option also provided that the bankrupt shall pay to the Bennetts \$350.00 per month "so long as the corporation retains said liquor license." No consideration was paid by the corporation for said option. Said option contained the following express stipulation:

"Proctor's Monte Cristo, a corporation, further promises and agrees that in the event it has not exercised the option to purchase liquor license, that it will on or before the 15th day of October, 1956, cause the said liquor license to be transferred to the said Bennetts or their assigns."

The option was accompanied by a guarantee signed by Thomas [32] L. Proctor and his wife, Shirley Mae Proctor, (who were the president and secretary of the bankrupt corporation) wherein they guaranteed the performance of the option by the bankrupt on conditions

"that in the event the said Proctor's Monte Cristo, a corporation, does not make any of the payments to the said Bennetts as hereinabove provided for or does not retransfer the said

liquor license as hereinabove provided for, the undersigned personally promise to the said Bennetts that they will make such payments, or in the event the said Bennetts exercise the option requiring the return of the said liquor license, the said Proctors will either cause said liquor license to be returned to the said Bennetts, or will personally pay to the said Bennetts the sum of \$18,000.00.”

3. Pursuant to the terms of the option, an escrow was opened between McDermott and the bankrupt for placing the license in the name of the bankrupt upon payment of the sum of \$18,000.00. As noted above, the consideration to McDermott was paid by the petitioner, and that the bankrupt never paid any consideration for the license.

4. The option was not exercised by the bankrupt, and the bankrupt did not pay any of the monthly payments for the use of the license or any part of the \$18,000.00.

5. Due to the fact that the option was not exercised or complied with, arrangement was made, prior to the bankruptcy, for the retransfer of the license to the petitioner “as originally intended when it was transferred to the corporation.” There is no evidence in the record that the retransfer would not have been approved by the Department of Liquor Beverage.

6. There is no testimony in the record that there

were any [33] creditors at the time when the license was placed in the name of the bankrupt under the terms of the option. Nor is there any testimony of any acts of reliance by the creditors on the paper title of the license in the bankrupt.

As above noted, the trustee's petition on which the order to show cause was based, rests on the single premise that the retransfer of the license by the bankrupt to the petitioner was without consideration; and the petition does not plead, nor does the testimony show, any element of estoppel on the part of the petitioner precluding him from asserting his rights under the option.

VI.

Based on the factual record, the Referee made the conclusion of law that the license was and is the property of the bankrupt estate and that the option was "illegal as an attempt to circumvent and violate the provisions of the Alcoholic Beverage Control Act of the State of California, and as an illegal contract is not binding upon this bankrupt estate."

VII.

Based on said conclusion of law, an order was entered by the Referee on July 21, 1955, that the on-sale liquor license "is the property of this bankrupt estate, and that Respondent Earl Bennett and the Alcoholic Beverage Control Board of the State of California have no right in and to the said license superior to that of the bankrupt estate herein."

VIII.

Petitioner alleges that said conclusion of law and order are erroneous for all and each of the following reasons:

1. An agreement to transfer a license is valid under the California law. Therefore, the option was not illegal or void.

2. Assuming (but not conceding) that the option was in contravention of the regulations of the California Department of [34] Alcoholic Beverage, such does not render the option void or illegal, since non-compliance with the regulations of the Department of Alcoholic Beverage is a matter that can be adjusted between the petitioner and the Department. It does not affect petitioner's property right in the license.

3. Assuming again that the option was void, the ownership of the license was at all times in the petitioner, who was the rightful owner thereof, and the apparent legal title thereto was held by the bankrupt in trust for the petitioner under the well settled law that under no circumstances could the bankrupt claim an interest in the license adverse to the petitioner.

4. There is no testimony in the record that there were any creditors at the time when the license was placed in the name of the bankrupt under the terms of the option. Nor is there any testimony of any acts of reliance by the creditors on the paper title of the license in the bankrupt.

As above noted, the trustee's petition on which the order to show cause was based, rests on the single premise that the retransfer of the license by the bankrupt to the petitioner was without consideration; and the petition does not plead, nor does the testimony show, any element of estoppel on the part of the petitioner precluding him from asserting his rights under the option.

5. Conclusions of the Honorable Referee are contrary to the law.

Wherefore, petitioner, feeling aggrieved because of the order hereinabove referred to, prays that the same be reviewed as provided by Section 39-c of the Bankruptcy Act; that said order be reversed; and that the Honorable N. C. Peters, Referee in Bankruptcy, prepare his Certificate on Review and attach thereto the following:

1. Transcript of reporter of all the evidence taken upon [35] the hearing on the petition hereinabove referred to.

2. Order of adjudication.

3. Petition (referred to in Paragraph II hereof) and order to show cause (referred to in Paragraph IV hereof) upon which this review is based.

4. Findings of fact, conclusions of law and order herein reviewed.

5. The following exhibits: The option, a copy of which is attached to the Findings of Fact, as Exhibit "A," and the resolution adopted by the Board

of Directors of the bankrupt corporation, authorizing the execution of said option.

6. Petition for review.

/s/ EARL BENNETT,
Petitioner.

MILLER, VANDEGRIFT, MIDDLETON AND
DARWIN H. WOLFORD AND ERNEST R.
UTLEY,

By /s/ ERNEST R. UTLEY.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 19, 1955. [36]

[Title of District Court and Cause.]

CERTIFICATE OF REVIEW

To the Honorable Leon R. Yankwich, District
Judge:

I, N. C. Peters, Referee in Bankruptcy in this proceeding, hereby certify that in the course of such proceeding an Order and Decision was made, a copy of which is annexed to the petition hereinafter referred to was made and entered on the 21st day of July, 1955.

That on the 1st day of August, 1955, Petitioner Earl Bennett feeling aggrieved thereat, filed a petition for review, which was granted.

That the error complained of by the petitioner being one in number is set forth in full in his petition.

That the summary of the evidence on which order was based is as follows:

That sometime in the month of October, 1954, Neil McDermott entered into an escrow with the bankrupt corporation for and in consideration of the payment of \$18,000.00. That said \$18,000.00 was paid by Earl Bennett in the escrow and the license was forthwith transferred to the bankrupt corporation. That the said license has and at all times, and does now stand in the name of the bankrupt corporation. That on or about January [38] 13, 1955, Earl Bennett made application to the California State Board of Equalization and gave notice of intention to transfer license to Earl Bennett without consideration; that the transfer of the liquor license to said Bennett without consideration would constitute a fraud upon the creditors of this bankrupt estate inasmuch as the same is being accepted without consideration.

I hand up herewith, for the information of the Judge, the following papers:

1. The record book or minutes of this proceeding showing.
2. The Petition on which this certificate is granted.

3. All other papers filed with me herein which are pertinent to this review.

/s/ N. C. PETERS,
Referee.

[Endorsed]: Filed August 22, 1955. [39]

[Title of District Court and Cause.]

ORDER ON PETITION FOR REVIEW OF
REFEREE'S ORDER FIXING TITLE TO
ON-SALE LIQUOR LICENSE

This matter having come on for hearing on the petition for review of Earl Bennett, on the 9th day of January, 1956, at the hour of 9:30 a.m. thereof; and the petitioner, Earl Bennett having appeared by and been represented through his counsel, Miller, Vandegrift & Middleton by Ernest R. Utley, and the respondent, E. W. Bailly, trustee in bankruptcy for Proctor's Monte Cristo, Inc., a corporation, bankrupt, having appeared by and been represented through his counsel, Craig, Weller & Laugharn by C. E. H. McDonnell; and briefs having been submitted, and the matter having been considered,

Now, Therefore,

It Is Ordered, that the Referee's Order fixing and determining title to the on-sale liquor license made and entered on July 21, 1955, be and it hereby is affirmed, and the Findings of Fact and Con-

clusions of Law on which the said order was [40]
made be and the same hereby are adopted.

Dated: March 26, 1956.

/s/ WM. M. BYRNE,
U. S. District Court Judge.

Approved as to Form:

MILLER, VANDEGRIFT &
MIDDLETON,

By /s/ ERNEST R. UTLEY,
Attorneys for Petitioner.

[Endorsed]: Filed March 26, 1956.

Docketed and entered March 27, 1956. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Earl Bennett, the
respondent in the within proceedings, and an in-
terested party therein, hereby appeals to the United
States Court of Appeals for the Ninth Circuit from
the order of the United States District Court,
Southern District of California, Central Division,
made and entered on March 27, 1956, adopting and
affirming the order of the Referee made and entered
in this proceedings on July 21, 1955, and adopting
the Findings of Fact and Conclusions of Law made
by the Referree, and denying the petition of Earl

Bennett for a review of the aforesaid order of this Referee.

Dated this 13th day of April, 1956.

MILLER, VANDEGRIFT &
MIDDLETON,

DARWIN H. WOLFORD,

ERNEST R. UTLEY,

By /s/ ERNEST R. UTLEY,
Attorney for Appellant.

[Endorsed]: Filed April 26, 1956. [42]

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 65347-WB

In the Matter of
PROCTOR'S MONTE CRISTO, INC., a Cor-
poration,

Bankrupt.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

ORDER TO SHOW CAUSE

Tuesday, April 5, 1955—10:00 A.M.

Before: Honorable N. C. Peters,
Referee in Bankruptcy.

Appearances:

For the Trustee:

CRAIG, WELLER & LAUGHARN, By
CHRISTOPHER E. H. McDONNELL,
Of Counsel.

For Certain Creditors:

MILLER, VANDEGRIFT &
MIDDLETON, By
THOMAS J. MIDDLETON,
OSCAR M. ADAMS.

The Referee: We will take up the hearing now in this Monte Cristo corporation on these orders to show cause.

Mr. McDonnell: Well, let's begin with the Carbonic Equipment Company matter and the American National Bank.

The Referee: Is there anyone here representing those parties?

Mr. Butz: I am Vernon, Butz, B-u-t-z, Carbonic Equipment Company.

Mr. Adams: I am Oscar M. Adams, Base Line Branch, American National Bank.

The Referee: You are both attorneys?

Mr. Butz: No.

Mr. Adams: No, sir.

The Referee: Neither one are attorneys.

Mr. McDonnell: Before we begin this matter, I brought Mr. Aasness here with me because of the gravity of this and the other order to show cause.

I thought we ought to have an official record. Would your Honor please swear Mr. Aasness?

(Thereupon, the reporter was sworn.)

Mr. McDonnell: Would your Honor swear Mr. Proctor in this proceeding, please?

The Referee: He has been sworn before.

Mr. McDonnell: Yes. Since this is a separate matter, I thought it would be better to have him sworn again. [3*]

The Referee: All right.

THOMAS PROCTOR

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. McDonnell:

Q. Mr. Proctor, are you the president of Proctor's Monte Cristo, Inc.? A. I was, yes.

Q. Has there been a new president since bankruptcy? A. No.

Q. And were you president on March 4, 1955? That was when the bankruptcy was commenced.

A. Yes, I was.

Q. You closed the business sometime during the month of January, did you not?

A. That's right.

Q. Do you know what that date was?

A. 12th or 13th, if I remember exactly.

Q. About the 12th or 13th, you say?

A. That's right.

(Testimony of Thomas Proctor.)

Q. Now, you didn't operate the business after that time? A. No, sir.

Q. I want to call your attention to a sum [4] of approximately \$531, which is in the American National Bank, I think the Base Line Branch. Do you know about that sum of money, Mr. Proctor?

A. Yes, I do.

Q. Tell me how it came, first of all, to be in the American National Bank?

A. I deposited it like I told you in previous interviews here, that it was put in there to pay the taxes and licensee for the liquor license.

Q. Was it deposited in the name of the corporation? A. In my name.

Q. Whose money was it, yours or the corporations? A. The corporation's money.

Q. It came from the corporation business, is that right?

A. It came from the business itself.

Q. And you make no claim to it personally?

A. That's correct.

Q. Now, after you deposited the \$531 in that account in your name, what happened?

A. Well, there was more put in there but that was the amount that was attached, or approximately the amount that was attached.

Q. I see. Do you know who the attaching creditors were? [5]

A. Carbonic Equipment Company and W. C. Brassfield and the American National Bank.

Q. W. C. Brassfield?

(Testimony of Thomas Proctor.)

A. That is correct.

Q. And Carbonic Equipment Company. Were they the attaching creditors?

A. I guess they are, or the American National Bank. I don't know which.

Q. Attached these——

A. Took the money out.

Q. I see. And about when did that occur, do you know?

A. No, I don't. I got a letter today with that information, but I don't remember the date at all.

Q. Perhaps the American National Bank could give the exact date.

Mr. Adams: Yes, attached the 5th day of January, 1955.

The Referee: Attached by whom?

Mr. Adams: The attachment is in the name of W. C. Brassfield.

Q. (By Mr. McDonnell): Now, when you commenced these bankruptcy proceedings on the 4th of March of this year, Mr. Proctor, what was the general financial condition of the company, good or bad? A. Well, it was very bad.

Q. Would you say that, at that time, it owned more money [6] than it had in assets?

A. Yes, sir, it did.

Q. Did it owe more money than it had in assets on January 5, 1955? Eight days before you closed it.

A. Well, I wouldn't know the exact amount on that. I imagine it would probably be approximately

(Testimony of Thomas Proctor.)

the same. I mean we were paying it out as fast as it came in.

Q. In other words, you were in about the same position that you were on the 4th of March?

A. That is correct.

Q. And that would be that you owed more than you had in assets?

A. In assets, yes.

Mr. McDonnell: That is all the questions I have of Mr. Proctor. Do the other gentlemen wish to cross-examine?

The Referee: Do you want to ask him any questions?

(Witness excused.)

Mr. McDonnell: I would like to have the man from the American National Bank sworn so I can put in some documentary evidence.

OSCAR M. ADAMS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. McDonnell: [7]

Q. You are Oscar M. Adams? You work for the American National Bank, Base Line Branch?

A. American National Bank, Base Line Branch.

Q. Were you so employed on January 5, 1955?

A. I was, sir.

Q. What, in general, is your capacity?

A. I am assistant branch manager.

Q. Do you know about the attachment in this

(Testimony of Oscar M. Adams.)

matter? A. Yes, sir.

Q. How much was attached on January 5, 1955?

A. The balance of the account at the time was \$570.26. We credited to our attached account \$300.33, the remainder, \$204.93, the conditional sales contract at that time was delinquent in the amount of \$204.93.

Q. Now, let me get this straight. When the attachment was run, you made a return, I presume, that you were indebted for \$365.33, is that correct?

A. That is correct, sir. That, however, has since been altered.

Q. In what fashion?

A. The attachment was received on the 5th day of January, 1955. On the 4th day of January, 1955, a check in the amount of \$117.88, drawn by Thomas Proctor, was cashed at our main office.

Q. Yes. [8]

A. By the time the check reached our branch to be paid, the account, of course, had been attached, the account closed, and the proceeds credited to the attached account awaiting, of course, further instructions. Inasmuch as the check had been prior to the attachment, we deducted the amount of \$117.88 from the \$365.33. We now hold \$247.45.

Q. Now, I am going to have to put this together so I understand it. You say that you cashed a cash check for \$117 on the 4th, or the 3rd?

A. The 4th day of January.

Q. The 4th day of January. That was not cashed at the same branch? A. No, sir.

(Testimony of Oscar M. Adams.)

Q. And when did that check reach your Base Line Branch?

A. It reached us on the 6th day of January.

Q. I see. After you had made the credit to the bank and reported that you were indebted in the sum of \$365.33?

A. That is correct, sir.

Q. And, now, with the conditional sales contract, when did you make this credit of \$204.93?

A. The 5th day of January, 1955.

Q. Before you transferred to the attachment account?

A. That is correct, sir.

Q. And that was on the delinquent conditional sales contract payment? [9]

A. That is correct.

Q. Who held the contract at that time?

A. The American National Bank.

Q. I see. Was it a with-recourse contract?

A. It was, sir.

Q. I see. And have you since returned it to the Carbonic Equipment Company?

A. We have not. We still hold it in a delinquent condition.

Mr. McDonnell: I see. That is all the questions I have. In fact, that is the trustee's case, Judge.

The Referee: All right.

Mr. McDonnell: Here is the trustee's position briefly: Here is an attachment run within four months of bankruptcy. Mr. Proctor testifies to insolvency, which I think would avoid the attachment.

That leaves us the question, in my opinion, of how much money are we entitled to. The original attachment was \$365.33, and apparently a return was made in that amount. I think that that affixed the attachment lien to that amount and I don't believe this banker's lien would supersede the attachment lien.

I believe that we are entitled to \$365.33, which was the original sum attached in the sum on which the return was made, I presume.

The Referee: What was that amount? [10]

Mr. McDonnell: \$365.33.

In other words, I don't believe the bank is entitled to it.

The Referee: \$365.33?

Mr. McDonnell: That's right.

That is the trustee's position.

Mr. Adams: Might I make a statement?

The Referee: Surely.

Mr. Adams: I would feel that, technically, a check is considered paid when the cash is advanced in the window, at the window, to the payee of the check, regardless of what branch, it is considered paid. The cash is advanced. Consequently, we were in error in our original return, which was the circumstance which we were not aware of until such time as the check reached the bank on which it was drawn.

I would hold that the correct sum would be \$247.45, inasmuch as the check was actually paid at the time he was at the window and not at any later time.

The Referee: What if it had been cashed by an outsider?

Mr. Adams: If it would have been cashed by an outsider, we would have had recourse against the endorsee.

The Referee: Wouldn't the same rule apply to the bank? One branch could have phoned the other branch and found out. They paid it without knowing it had been attached. If it had been cashed by an outsider, he would still be subject to the [11] attachment.

Mr. Adams: My point is it was cashed one day before the attachment was run. The fact that it merely had not cleared the bank and been paid against the account doesn't affect the fact that the check was actually paid and reduced the balance by that much. The check was considered paid on January 4; the attachment was run on January 5th.

Mr. McDonnell: I would prefer to analyze the problem this way, from a lien standpoint. As your Honor knows, the law is well-settled that the debtor creditor relationship between a bank and depositors. Now, let's analyze the situation. On the 4th, when the check was cashed, Mr. Proctor brought in a slip of paper which was an order on the bank to pay from his account.

Mr. Adams: Mr. Proctor didn't bring in the check.

Mr. McDonnell: The check was cashed in some fashion. I don't know how. At that moment, the situation was that Mr. Proctor owed the bank, from

his account, the sum, \$117. At the same time, of course, the bank in the other branch had an indebtedness to Mr. Proctor.

Now, before the banker's lien was attached, which is the only right the bank would have had to go in and take the money out of the other account, before that lien attached, they made a return on a marshal's attachment, the return being that they owed Mr. Proctor a net sum of \$365.33. Now, [12] the minute they made that return and transferred the money from the general account to the attachment account, they placed it in a special account to which the bank had no right of recourse under its banker's lien and, therefore, the attachment lien would be prior. This trustee, under Section—I think—70(c), that attachment—in other words, he can take the attaching creditor's rights and therefore acquires the right of lien against that fund transferred into the trust account, is what it is essentially, and, for that reason, the bank has no right to exercise its banker's lien and remove from that account which is no longer the general account of Mr. Proctor, the sum of \$117.

Now, that is the trustee's position in a nut shell.

Mr. Adams: The bank's position to counteract that, sir, would be, in effect, that the account was reduced by \$117.88 on the 4th day of January. Our books showed a figure which was in error and, because of showing that in error, we transferred the wrong amount to the attached account. Actually, the check was paid, considered to be paid, on the 4th day of January, one day previous to the attachment.

We were in error in transferring \$365.33 to the attached account.

Mr. McDonnell: But once the bank had made that error and had credited the sum into the new account, the lien of the attaching creditor attached to that money and that right [13] passes to the trustee.

The Referee: The trustee stands in this as a creditor with a lien on that fund. However. I will give you a week in which to file a brief to establish your contention. I think his contention is correct, but I will give you a week in which to file a brief.

Mr. Adams: Very well.

Mr. McDonnell: Will you take the matter under submission, then, Judge, pending the filing of a brief? I presume that, if the bank does file a brief, I have the right to file within seven days in reply. Is that satisfactory?

The Referee: They file their brief in seven days and, if you want, then you can reply to it in three days, so it wouldn't have to be continued more than two weeks.

Mr. McDonnell: All right. If I am going to reply, I will reply in time. If I am not going to reply, I will notify you and the bank immediately.

The Referee: Yes. We will continue that incident for two weeks.

Mr. McDonnell: Why don't you just take it under submission?

The Referee: All right. It will be submitted, then, in briefs.

Any other issues under this order to show cause?

Mr. McDonnell: I don't believe so. I don't [14] think so. Is there any question in your mind on this attachment so far as attaching creditor is a void attachment, Judge?

The Referee: Of course, the statute makes it void when the attachment be levied while the debtor was insolvent within four months. The knowledge of his condition is not essential; it is an attachment.

Mr. McDonnell: I would like to say that apparently Carbonic Equipment Company has been joined in this matter through error. Mr. Proctor informed the trustee they were one of the attaching parties. I perceive they were not. Actually, Carbonic is not a party to this proceeding. Let me ask the gentleman: You didn't run an attachment?

Mr. Butz: No.

Mr. McDonnell: There has been no attachment from Carbonic Equipment Company on the money.

I will prepare a separate order taking the Carbonic Equipment Company out of the order to show cause. You were here in error, and I will recite it so and serve it.

The Referee: Any other questions?

Mr. Adams: I would like to ask one other question. We still hold the conditional sales contract in a delinquent condition. In order that we might salvage the unpaid balance, we would like permission to remove the equipment from the premises, 1996 Highland Avenue, so we can clear our delinquent contract. [15]

The Referee: Now, a conditional sales contract from a legal standpoint is the same as a chattel

mortgage. That is, the trustee has the same rights as if it were a chattel mortgage.

Mr. McDonnell: Maybe I can help the Judge. We have surveyed the premises. We are convinced there is no equity. If the American National Bank wants to remove all of the property, it will be perfectly satisfactory to do that at once. I know you want to get the property out.

The Referee: Well, the trustee has 60 days in which to assume future contracts. He seems to have waived his right to do so. If 60 days hasn't elapsed, well, then, you would have to get an order authorizing the abandonment of his property.

Mr. McDonnell: If the American National Bank will give me a list of the equipment, I will prepare such an order. We have no desire to assume the contract or hold them from the property.

The Referee: All right.

Mr. McDonnell: Now, can we go ahead on the Bennett order to show cause, Judge?

The Referee: Yes.

Mr. McDonnell: This matter is ready for the trustee.

Mr. Middleton: My name is Thomas J. Middleton. I am appearing for Mr. Bennett. [16]

The Referee: Do you have Mr. Bennett in person?

Mr. Middleton: Yes.

The Referee: Who else appears?

Mr. Shorey: Charles Shorey.

Mr. McDonnell: The State of California is also present, your Honor. Your name is Shorey, and you appear for the State Board of Equalization?

Mr. Shorey: Charles Shorey, S-h-o-r-e-y.

The Referee: Now, what is the Bureau that you appear for?

Mr. Shorey: The Department of Alcoholic Beverage Control.

The Referee: Do you want to amend your order?

Mr. McDonnell: I will amend the order, and I will recite in that that Department of Alcoholic Beverage Control.

Mr. Middleton: Correct. That was changed over on January 1st from the Board of Equalization.

Mr. McDonnell: Are we ready to go?

The Referee: Yes.

Mr. McDonnell: I would like to have Mr. Proctor sworn again, since this is a separate proceeding.

THOMAS PROCTOR

was called as a witness and, having been first duly sworn, was examined and testified as follows: [17]

Examination

By Mr. McDonnell:

Q. Your name is Thomas Proctor, and you are the president of the bankrupt corporation, is that correct? A. Correct.

Q. And have you also been the president ever since its formation? A. Right.

Q. I see. Now, I want to interrogate you about a liquor license. What sort of an operation was Proctor's Monte Cristo? Was it a dining room and cocktail lounge?

A. It was a dining room and cocktail lounge.

(Testimony of Thomas Proctor.)

Q. And had it been operated as a dining room and cocktail lounge previous to the time you came into the picture? A. It had been.

Q. Do you know by whom?

A. Neil McDermott had the building out there before we did, previous to that.

Q. Just the one right before you. You say his name is Neil McDermott?

A. That's right?

Q. How do you spell that?

A. M-c-D-e-r-m-o-t-t.

Q. All right. Now, do you have a liquor license in your own name for the right to operate Proctor's Monte Cristo?

A. I have never had a liquor license. [18]

Q. Did Proctor's Monte Cristo obtain a liquor license? A. It did.

Q. Will you tell us how?

A. Mr. Bennett obtained the license and he obtained it from Neil McDermott.

Q. Now, in whose name did the liquor license stand?

A. Well, at the time it was bought, in Neil McDermott's own name, I believe, and then, of course, when it was transferred over, it had to be in the name of the corporation.

Q. Did you at all times understand that it had to be in the name of the corporation and couldn't be in Mr. Bennett's name?

A. That is correct.

Q. I see. And do you know whether or not the

(Testimony of Thomas Proctor.)

license was transferred direct from Mr. McDermott to the corporation, or whether it was transferred to Mr. Bennett and then to the corporation?

A. That I don't know. You would have to ask him about it.

Q. You don't know about that? A. No.

Q. Do you know what happened with the liquor license when the business closed up in the month of January?

A. Mr. Bennett had the liquor license.

Q. Just tell me what happened. You got ready to close [19] the business and then what happened? Did you and Mr. Bennett discuss the matter?

A. Oh, yes, it was thoroughly discussed. That was when we decided to close the business. We had a meeting of all the directors, all of us, and we closed the business down at that time.

Q. And did Mr. Bennett and you discuss the situation of the liquor license at that time when you were closing down?

A. The liquor license had been discussed previous to that, and that time also, and the fact that the business didn't go like it should and as it should be, the liquor license went back to him.

Q. I see. And, Mr. Proctor, you were having trouble with your creditors in January, weren't you? A. Yes, sir.

Q. They were really after you. Now, the corporation entered into some sort of an agreement with Mr. Bennett, did it not, concerning the liquor license? A. That is correct.

(Testimony of Thomas Proctor.)

Q. There was a board of directors meeting concerning that, is that correct?

A. That is correct.

Q. Let me see if I can find the minutes. Now, I am going to lay before you—I will let counsel see this—I might say, I didn't mean to restrict counsel from the whole [20] set of minutes. That was the pertinent part.

Mr. Middleton: What portion are you referring to?

Mr. McDonnell: I am going to refer to that portion of the meeting which discusses the liquor license. There were a number of things that took place at the same meeting. I just want to discuss that. That is, the liquor license.

While you have the book, do you have the original of this agreement?

Mr. Middleton: Never seen any part of it.

Q. (By Mr. McDonnell): I lay before you a book, bound book, Mr. Proctor, and I call your attention to the fourth page of the minutes for the meeting of September 3rd, 1954. Were you at that meeting in September, 1954, Mr. Proctor?

A. Yes.

Q. And, now, I want to call your attention to this portion of those minutes: "Whereas Earl Bennett and Isabelle Bennett have acquired a general on-sale liquor license and have paid the sum of \$18,000 for same * * *"

Well, let me interrupt right there at the comma. I understood you to say before, Mr. Proctor, that

(Testimony of Thomas Proctor.)

the license had been obtained or gotten directly from Mr. McDermott to the corporation, or perhaps I didn't understand you correctly.

A. No. Just a minute ago, I said I didn't know what happened.

Q. All right. Now, beginning after the [21] comma: “* * * and proposed to take said liquor license in the name of the corporation upon the corporation's promise to pay them the sum of \$350 a month during the time that said corporation uses said liquor license, that the corporation having the option to buy the liquor license at any time on or before October 15, 1956, and that a copy of the proposed agreement between Earl Bennett and Isabelle Bennett and the said corporation is attached hereto and marked Exhibit C, and whereas it is deemed to be in the best interests of this corporation that they accept said offer for the reason that it has been impossible to acquire a general on-sale liquor license in any other way and all the parties interested in this corporation deem such liquor license to be necessary; now, therefore, be it resolved to the president and secretary of this corporation be, and they are hereby authorized and directed to execute on behalf of this corporation the agreement re liquor license, wherefore the general on-sale liquor license is transferred to said corporation upon the said corporation paying to Earl Bennett and Isabelle Bennett the sum of \$350 per month during the time that said corporation uses said on-sale liquor license; the corporation having the option to

(Testimony of Thomas Proctor.)

pay for said liquor license at any time on or before October 15, 1956. Be it further resolved to the president and the secretary of this corporation be and they are hereby authorized and directed to apply to the State Board of Equalization for [22] the transfer of the said on-sale liquor license."

Do you recall that transaction at the meeting, Mr. Proctor, as recited? A. Yes.

Q. And at that time did you vote and authorize it as the minutes recite? A. That's right.

Q. Now, was a contract drawn up before that or after that meeting concerning this liquor license?

A. The contract was part of it.

Q. Was it present at the time of the meeting?

A. That is correct.

Q. The meeting was held in Swing's office, is that right? A. That is correct.

Q. He is an attorney at law in San Bernardino?

A. That's right.

Q. Do you know whether the contract was drawn in his office or not?

A. He drew the contract.

Q. And this arrangement was made with legal counsel? A. That is correct.

Q. I see. Now, in the same minute book, I find a copy of an agreement re liquor license. Do you recognize his signature thereon? [23]

A. Yes.

Q. One of them yours and one of them your wife's?

(Testimony of Thomas Proctor.)

A. My wife's signature isn't on there. It is down here, but not up there.

Q. You mean it is on the guarantee portion? You and your wife guaranteed personally the payments? A. That's right.

Q. I see. Now, it says "Earl Bennett." Is that his signature? A. Yes.

Q. Do you recognize his wife's signature?

A. Yes, I do. Isabelle.

Q. Isabelle Bennett.

Mr. McDonnell: Counsel, do you have the original of this agreement?

Mr. Middleton: Never seen it.

Mr. McDonnell: We do not have the original anywhere, except this, which is apparently a duplicate signed and executed in full form, and I would like to offer this agreement at this time as trustee's first in order.

Now, I don't like to tear it out of the minute book, so I am going to offer it in the minute book and ask counsel if he will agree to let me have photostatic copies made and substitute them.

Mr. Middleton: I would object to that until such time as [24] it is determined what happened to the original.

Q. (By Mr. McDonnell): Mr. Proctor, do you know where the original is?

A. The original copy of this, you mean?

Q. Yes. A. I don't know.

Q. Did you ever see another copy other than this? A. Do you have the original, Earl?

(Testimony of Thomas Proctor.)

Q. Did you ever see any copy?

A. There was quite a few copies that were signed.

Q. And were they all signed equally?

A. They were.

Mr. McDonnell: I will offer this as a duplicate original.

The Referee: All right.

(Thereupon, the document above referred to was received in evidence as Trustee's Exhibit No. 1.)

Q. (By Mr. McDonnell): Did you, as an officer of the corporation, go into an escrow to transfer this license to Mr. Bennett sometime in January?

A. Yes, it was put in escrow.

Q. Was the corporation to receive any consideration for the transfer of the license at that time?

A. None whatsoever.

Mr. McDonnell: I think that is all the questions I have of Mr. Proctor at the moment. [25]

Examination

By Mr. Middleton:

Q. Mr. Proctor, the corporation never paid anything for a license that you referred to, the liquor license?

A. As buying it, no, they did not.

Q. Did you know at all times, as president of the corporation, that the license was being used by the corporation as a matter of convenience?

(Testimony of Thomas Proctor.)

A. That is correct.

Q. And this was a lease arrangement whereby the corporation used the license but paid no consideration of any kind for it, is that correct?

A. Well, the corporation used the license, but it paid \$350.

Q. For the use of the license?

A. For the use of the license, yes.

Q. There was an option to purchase the license?

A. That is correct.

Q. Was that option ever exercised?

A. No. Never got any money.

Q. And the corporation, as you have already testified, never paid anything toward the purchase price?

A. That is correct.

Mr. Middleton: That is all.

Mr. McDonnell: I should like to call Mr. Bennett under [26] Section 21(j) of the Bankruptcy Act.

EARL BENNETT

was called as a witness and, having been first duly sworn, was examined and testified as follows:

Examination

By Mr. McDonnell:

Q. Your name is Earl Bennett, is that correct?

A. Yes, sir.

Q. On the 4th of March, 1955, Mr. Bennett, were you an officer of the bankrupt corporation?

A. Yes, sir.

Q. What officer were you? A. Secretary.

(Testimony of Earl Bennett.)

Q. Were you a director of the bankrupt corporation?
A. Yes, sir.

Q. And were you a stockholder of the bankrupt corporation on that date?
A. Yes, sir.

Q. Had you been at all times after, say, the 1st of January, 1955, an officer-director and stockholder?
A. Yes, sir.

Q. Now, tell us: You have heard the testimony about the liquor license. Tell us how you came to purchase the liquor license, Mr. Bennett.

A. Well, do you want me to give a resume? [27]

Q. Yes. Just tell me how the liquor license transaction went. I want your version of the facts.

A. Well, it is a matter of record, as I gave it before, I believe.

Q. That doesn't apply in this hearing.

A. I bought the license from Neil McDermott and transferred it to the corporation, paid \$18,000 for it.

Q. Now, let's see. When you say you bought the license, do you mean you took it in your own name?

A. No, I paid for it.

Q. I want to get the details of the transaction. When you arranged for the purchase of this license with McDermott, was an escrow opened?

A. Yes.

Q. And who was the escrow between, do you know? Between Neil McDermott—and was it being transferred direct to the corporation?

A. The corporation.

Q. You were not a part to the escrow, is that

(Testimony of Earl Bennett.)

correct? That is, not one of the formal escrow parties, buyer-seller? A. Not of record.

Q. I see; now in the escrow, did you put some money in? A. Yes.

Q. How much did you deposit in the [28] escrow? A. In the escrow, \$17,500.

Q. Had you paid some money outside of escrow?

A. On the day previous, I had given Mr. McDermott a check for \$500.

Q. I see. So you gave him \$500 outside and you put \$17,500 in the escrow?

A. That's right.

Q. It was your personal check, was it, or did you do it through the corporation?

A. Personal check, each check.

Q. And then Mr. McDermott, he deposited the liquor license in the escrow?

A. That is correct.

Q. The escrow closed, and, to your knowledge, was the license placed in the name of the corporation? A. That's right.

Q. Now, wasn't there some discussion at one time that the license should be taken directly in your name, Mr. Bennett?

A. There may have been some discussion, as there was a great deal of discussion previous to obtaining a license.

Mr. Middleton: Just a moment. Could we have a little better foundation? When——

Q. (By Mr. McDonnell): Will you tell us when the transaction occurred, Mr. Bennett?

(Testimony of Earl Bennett.)

Mr. Middleton: What are you asking? [29]

Q. (By Mr. McDonnell): Was there a discussion—and I waited for a yes or no answer, counsel. I just wanted to know whether there was a discussion.

A. Yes, there was a discussion.

Q. The answer was, "There was a discussion."

With whom was the discussion?

A. Well, there was a discussion in Mr. Swing's office in the presence of the Proctors and Mr. Swing.

Q. In the presence of whom?

A. The Proctors, Mr. and Mrs. Proctor, and Mr. Swing.

The Referee: And yourself?

The Witness: And myself and Mrs. Bennett.

Q. (By Mr. McDonnell): And when was that, approximately?

A. That was previous to obtaining the license, but I could not say.

Q. Was it before September 3rd, the date of the contract in the minutes?

A. Yes.

Q. About how long before that?

A. It could have been two weeks.

Q. Now, what was the substance of that conversation concerning your taking the liquor license in your own name?

A. Well, the license, as I was informed, had to be in the name of the occupant or the business.

Q. And so you understood then that you couldn't hold [30] it in your name and have a business operated by Proctor's Monte Cristo Corporation, is

(Testimony of Earl Bennett.)

that correct? A. That is correct.

Q. And is that why you permitted the license to be taken in the name of the corporation?

A. That is the only reason.

Q. I see. Now, in January, 1955, Mr. Proctor has testified an escrow was opened to transfer the license back to you. Why was that done at that time?

A. In accordance with our agreements, our previous agreements with the license being entrusted with the corporation.

Q. Well, I am not clear about that. Was there a delinquency in the payments?

A. That and the fact that the corporation had failed and was closing.

Q. And you knew that? A. Yes.

Q. And did you know that it owed debts to its creditors? A. Yes.

Q. And so, then, you suggested, did you, that Mr. Proctor and you go through with the original agreement and transfer the license back to you?

A. I am not positive who suggested it first.

Q. But you discussed it with him? [31]

A. Yes.

Q. The escrow has not closed, has it, Mr. Bennett, to your knowledge?

A. The license has not formally come through yet.

Mr. McDonnell: I see. That is all the questions I have of Mr. Bennett.

(Testimony of Earl Bennett.)

Examination

By Mr. Middleton:

Q. Mr. Bennett, when you permitted the license to be transferred direct from McDermott to the corporation, you merely nominated the corporation as the holder of the license under that agreement that Mr. McDonnell read? A. That's right.

Q. And then the payments became delinquent; the corporation paid no payments on it for the use of the license, you arranged with the other members of the board of directors to transfer the license back to you as originally intended when it was transferred to the corporation? A. Yes, sir.

Mr. Middleton: That is all.

Mr. McDonnell: Before closing the trustees' case, I would like to recall Mr. Proctor for just one question.

The Referee: All right. [32]

THOMAS PROCTOR

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Examination

By Mr. McDonnell:

Q. Mr. Proctor, were there creditors of this corporation in existence at the time of the opening of the escrow to transfer the license to Mr. Bennett? Were there creditors in existence, who were still in

(Testimony of Thomas Proctor.)

existence and were still owed money on March 4, 1955?

A. Now, how do you mean by creditors? From what time, I mean?

Q. What I am trying to find out is if there was a creditor or creditors of this bankrupt who had been owed money from the time of the attempted transfer through the escrow to Mr. Bennett up until the time of bankruptcy. In other words, someone whom you had not paid in that period.

A. Well, you mean from the time we changed the——

The Referee: Were there creditors who were creditors at that time?

The Witness: Yes.

Q. (By Mr. McDonnell): Many of them?

A. Quite a few of them.

Mr. McDonnell: No further questions. That is the case of the trustee. [33]

Mr. Middleton: Nothing further, your Honor.

The Referee: All through?

Mr. McDonnell: That is the evidence, as far as the trustee.

The Referee: All right. Do you want to argue the issues?

Mr. McDonnell: Well, if your Honor wishes to hear argument, the trustee's position is a simple one. The policy of the Alcoholic Beverage Control Act as it is now embodied in the business and professional code has been, and always, as far as I know, always has been and still is, that the license to a liquor, on-

sale liquor license, must stand in the name of the actual operators of the particular bar.

Of course, the public policy behind this is clear. The purpose of the requirement is so that those who are excluded by law from owning licenses can be prevented from owning them secretly. This is no reflection on Mr. Bennett. I don't have that in mind, but that is the policy of the law.

It is enunciated in the code section, Business and Professional Code Section 24040.

Now, if you will examine Business and Professional Code Section 24074, it will be discovered that the manner in transferring liquor licenses in this state requires an escrow and requires a notice so that creditors may be apprised of the transfer of an extremely valuable asset, perhaps in many cases of bars and grills, the only valuable asset to give [34] them a chance to participate in the escrow and in the consideration and they must be paid out of the escrow. In case it would have done the creditors no good, the transaction was to return the license without any consideration to Mr. Bennett.

Now, it is true that Mr. Bennett paid for the liquor license, and that is perhaps an unfortunate thing for Mr. Bennett, but he deliberately permitted the license to be taken in the name of the corporation knowing that he could not hold it and have the corporation operate the bar.

Furthermore, Mr. Bennett knew that the corporation was in, to use the term mildly, a dilapidated financial condition, that was known to him; he was an

officer and director and shareholder and it was deliberately done for that purpose.

Now, as between the bankrupt and Mr. Bennett, the agreement entered into may be—I don't know, I don't think it is in issue—a perfectly valid arrangement. But as between someone who, like the trustee, represents a creditor holding a lien by a legal or equitable proceeding, a most favored creditor, between such an individual and Mr. Bennett, it is quite another problem that is posed.

We have this asset, a valuable asset, and presumptively creditors had relied on that in extending credit, for the existence of such an on-sale liquor license. It was in the name of the corporation. It had never been in Bennett's name. [35] The transaction, even in the escrow, had named only the corporation. So, between the creditors, the representative of the creditors, Mr. Bailey, and Mr. Bennett, I think that the true owner of the license is the corporation and must remain so. Otherwise, a very shameful fraud would be perpetrated upon the creditors who saw a bar and grill, knowing there had to be a liquor license, and suddenly the thing is transferred out without any consideration.

"There is one other point I wish to make. The only county case involving the former State Board of Equalization declares a liquor license to be nothing more than a privilege, as nothing more than a privilege. It seems to me that any contention that the license was being held in trust or under any sort of an arrangement where the true owner was Mr. Bennett, though the ostensible owner, no matter what

the law might think, was the corporation. In that sort of a situation, that argument cannot be made because the license is nothing more than a privilege which is what the only county case declares the license to be.

I do not think it is species property which, in this state, can be held in trust by one individual for another. So it seems to me that, in line with what I think is the settled purpose of the law, in line with the protection of the rights of creditors; in view of Mr. Bennett's deliberate placing of the license in the corporation, and also in view of the [36] Orange County case, I think that the license belongs to the corporation free and clear of any claim of Mr. Bennett to it.

Mr. Middleton: Well, I think Mr. McDonnell has answered the questions specifically insofar as Mr. Bennett is concerned. There is the property right in this license. It is a privilege. And that the Orange County case held, whatever it was, this license was loaned to the corporation. It is no more than loaning a settee or a bar. They had no property right in this license. They had an option to purchase it at some future time. They were paying a rental for the use of the license. It might very well be that it is illegal insofar as the State of California is concerned, but it has no bearing whatsoever in a bankruptcy case.

They have no more right in that license—the record, the minutes, the agreement speak for themselves. They had a right, an option to purchase. It

is perfectly above board. They went to an attorney, prepared the matter, took his advice.

As I say, it might very well be in violation of the laws of the State of California but it certainly has no bearing in a bankruptcy case. He paid the full consideration. There is no dispute in that connection. He would be deprived of his property because of a corporation which he was an officer of went bankrupt.

The Referee: Any more evidence?

Mr. McDonnell: Does your Honor wish any more argument? [37]

The Referee: What have you got Mr. Shorey here for?

Mr. McDonnell: Because the State Board of Equalization—pardon me—the Department of Alcoholic Beverage Control still holds the power under the law to transfer or not to transfer the license, Judge.

Your Honor, as I understand, an order to show cause which enjoined the transfer, because I did not want the escrow to close and the problem of jurisdiction to arise, and that is why the Department of Alcoholic Beverage Control was served in this matter, albeit I served them by the wrong name.

The Referee: Well, this case seems to be quite mixed up, and also complicated, and I don't ever want to pass on any points without getting all the evidences and the points and also having all the law there is on the point, so I want both sides to brief your legal points.

You want how much time?

Mr. McDonnell: Well, do you wish me to open, Judge? I think that is proper. I have the burden.

The Referee: All right.

Mr. McDonnell: Just one more matter, Judge. Pending the final determination in this matter, I would like to ask the Court to extend the injunction so that the license, the privilege will not be transferred.

The Referee: All right, the injunction is extended.

(Whereupon, the hearing was concluded.)

State of California,
County of San Bernardino—ss.

I, Herbert W. Aasness, pro tempore reporter of the above-entitled court, do hereby certify that the foregoing pages 1 to 38, inclusive, constitute a full, true and correct transcript of proceedings had on Tuesday, April 5, 1955, at 10:00 o'clock a.m. in the matter of Proctor's Monte Cristo, Inc., Bankrupt.

Dated this 13th day of September, 1955.

/s/ HERBERT W. AASNESS,
Pro Tempore Reporter.

[Endorsed]: Filed September 1, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 44, inclusive, contain the original

Order of Adjudication;

Petition for Order to Show Cause;

Findings of Fact & Conclusions of Law & Order thereon;

Points & Authorities on Order to Show Cause vs. Earl Bennett;

Decision on Claim to Liquor License;

Order to Show Cause;

Petition for Review;

Certificate of Review;

Order on Petition for Review of Referee's Order Fixing Title to On-sale Liquor License;

Notice of Appeal;

Appellant's Designation of Record on Appeal;

which, together with report on proceedings of April 5, 1955, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing the foregoing transcript amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of said District Court
this 31st day of May, 1956.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15157. United States Court of Appeals for the Ninth Circuit. Earl Bennett, Appellant, vs. E. W. Bailly, Trustee in Bankruptcy of Proctor's Monte Cristo, Inc., a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 7, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15157

In the Matter of
PROCTOR'S MONTE CRISTO, INC., a Corpora-
tion,

Bankrupt.

CONCISE STATEMENT OF POINTS TO BE
RELIED UPON, UPON APPEAL

Appellant, Earl Bennett, petitioner on review in the District Court from the order of the Referee made and entered July 21, 1955, respectfully submits the following concise statement of points on which appellant intends to rely:

I.

That on or about the 3rd day of September, 1954, appellant, Earl Bennett, became the owner of a certain on-sale liquor license, referred to in these proceedings, through the purchase from Neil McDermott, and by the payment to the said Neil McDermott of the sum of \$18,000.00, the purchase price therefor. That the transfer of said liquor license was handled through an escrow, and appellant nominated the bankrupt corporation herein as the holder of the said liquor license under the terms of an agreement, Exhibit 1 herein.

The bankrupt did not make the rental payments called for under the contract, and failed to exercise

the option mentioned therein and later, and prior to the bankruptcy, attempted to return the license to the name of its true owner, appellant herein. While said transfer was pending before the State Board of Equalization, the within proceeding was filed in the above-entitled case. The entire transaction, and its nature, was fully set forth in the minutes of the corporation and duly authorized by the bankrupt corporation, and there was no attempt at any time to conceal the true ownership of said liquor license, or to conceal the capacity in which the bankrupt corporation held the same.

II.

That under the facts presented, the bankrupt corporation held the license in trust for the appellant, and as the lessee of said license.

III.

There is no allegation in the Petition for Order to Show Cause herein that creditors relied upon the paper title of the license in the bankrupt in extending it credit, nor is there any evidence supporting such a theory.

IV.

The element of estoppel is neither pleaded nor established by the evidence.

V.

That the Court erred in its Finding III to the effect that on September 3, 1954, the bankrupt corporation entered into an escrow agreement with

Niel McDermott for the purchase of an "on-sale" liquor license No. P-11129, for and in consideration of the sum of \$18,000.00. The Court erred in its Conclusions of Law I that "The Court concludes that the On-Sale Liquor License No. P-11129 is the property of this bankrupt estate."

VI.

That the Court erred in its Conclusion of Law II that "The Court concludes that the "Agreement Re Liquor License" is illegal as an attempt to circumvent and violate the provisions of the Alcoholic Beverage Control Act of the State of California, and as an illegal contract is not binding upon this bankrupt estate."

VII.

That the Court erred in making the following order: "Now, Therefore, It Is Ordered that the Petition of the Trustee herein be, and the same hereby is granted, and it be and it hereby is fixed and determined that On-Sale Liquor License P-11129 is the property of this bankrupt estate, and that Respondent Earl Bennett and the Alcoholic Beverage Control Board of the State of California have no right in and to the said license superior to that of the bankrupt estate herein."

VIII.

Appellant contends:

(a) That the agreement to transfer the liquor license is valid under the California law, and that neither the lease contract nor the option was illegal or void.

(b) Assuming (but not conceding) that the option was in contravention of the laws of the Department of Alcoholic Beverages does not render the option void or illegal since noncompliance with the regulations of the Department of Alcoholic Beverages is a matter that can be adjusted between the petitioner and the department. It does not affect petitioner's property right in the license.

(c) Assuming again that the option was void, the ownership of the license was at all times in the petitioner, who was the rightful owner thereof, and the appellant's legal title thereto was held by the bankrupt in trust for the petitioner under the well-settled law that under no circumstances could the bankrupt claim an interest in the license adverse to the petitioner.

(d) There is no testimony in the record that there were any creditors at the time when the license was placed in the name of the bankrupt under the terms of the option, nor is there any testimony of any acts of reliance by the creditors on the paper title of the bankrupt in the license.

(e) The trustee's petition on which the order to show cause was based rests on the single premise that the retransfer of the license by the bankrupt to appellant was without consideration; and the petition does not plead, nor does the testimony show, any element of estoppel on the part of the petitioner precluding him from asserting his rights under the agreement of lease and option.

(f) The conclusions of the Honorable Referee,

and the order of the United States District Court are contrary to the law.

Dated: August 30, 1956.

MILLER & VANDEGRIFT &
MIDDLETON,

DARWIN H. WOLFORD,

ERNEST R. UTLEY,

By /s/ ERNEST R. UTLEY,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 31, 1956.